United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 08-413**
	)	**Issued: November 18, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2007 appellant filed a timely appeal from the June 13, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office hearing representative's August 28, 2007 nonmerit decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

On January 12, 2007 appellant, then a 37-year-old supervisor, filed a claim alleging that he sustained an emotional condition in the performance of duty. He stated that his claim was

"for the continuous retaliation, very stressful and hostile working environment that management places me in I think about it 24 hr a day several days a week what will management do next to me." Dr. A. Jean-Pierre, a Board-certified psychiatrist, diagnosed adjustment disorder with mixed emotional features and panic disorder with anxiety. He reported that it appeared circumstances at work were contributing to appellant's condition.

Appellant alleged that on July 9, 2003 a postal employee threatened to kill him but that management refused to submit a claim form to the Office and falsified what happened to the Office, the Office of the Inspector General and the Equal Employment Opportunity (EEO) Commission. He stated that managers told him they would continue the stressful and hostile environment until he quit. Appellant wrote about being threatened with discipline for attendance, being threatened with demotion, being required to undergo a fitness-for-duty examination, being issued a letter of warning, being issued a removal letter for attendance after he filed an EEO complaint, being refused a pay raise, having an involuntary administrative salary offset, being threatened with discipline for going to his federal deposition and taking approved leave, and being fired for using family medical leave. He stated that he filed several EEO complaints. Appellant alleged direct harassment on a daily basis and retaliation for his EEO activity and federal law suit.

The employer responded to appellant's allegations with statements from several managers. The managers addressed appellant's allegations with denials and clarifications (an employee had threatened to kill himself, not appellant). In some instances, the employer accused appellant of fabrication.

In a decision dated June 13, 2007, the Office denied appellant's claim for compensation. It found that he did not establish a compensable factor of employment.

On July 19, 2007 appellant completed an Appeal Request Form indicating that he was requesting an oral hearing before an Office hearing representative. His request was postmarked July 30, 2007.

In a decision dated August 28, 2007, the Office found that appellant was not entitled to an oral hearing as a matter of right because his request was untimely. It denied a discretionary hearing on the grounds that appellant could equally well address the issue in his case through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty,[1] but workers' compensation does not cover each and every injury or illness that is somehow related to employment.[2] An employee's emotional reaction to an administrative or personnel matter is generally not covered by workers' compensation. Nonetheless, the Board

[1] 5 U.S.C. § 8102(a).

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

has held that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in an administrative or personnel matter, may afford coverage.[3] As a rule, however, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[4] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[5]

ANALYSIS -- ISSUE 1

Appellant alleged that his superiors caused him an emotional injury. Although, his allegations have some connection to his federal employment, that fact alone does not bring his claim within the scope of the Act. Appellant's emotional reaction to any administrative or personnel matter -- whether it involves a disciplinary matter, a leave matter, the denial of a higher performance rating, a fitness-for-duty examination, or even his removal from employment -- is not generally compensable absent evidence of error or abuse.

However, this exception to the general rule must be promised on the evidence of record. Appellant must do more than make allegations of error or abuse. He must substantiate his allegations with proof. This is where appellant's claim fails. Appellant submitted an eight-page statement detailing his allegations against management. On February 6, 2007 the Office reviewed this statement thoroughly and informed him that his allegations alone did not substantiate error or abuse. Appellant needed to submit evidence to show that his allegations were grounded in fact, not just his perceptions.

Appellant alleged that on November 6, 2004 Andrew Cuccia and James Kleber both told him that he was going to be demoted from supervisor of maintenance operations because he was "only fit to supervise custodians." The Office advised appellant to submit evidence to prove Mr. Cuccia and Mr. Kleber actually said this. It was not enough simply to make the allegation. Appellant had to submit evidence to prove that the incident occurred as alleged. The primary reason for requiring factual evidence from the claimant in support of his allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[6]

Appellant did not support his allegations with supporting factual evidence. Moreover, management rebutted his allegations. On January 25, 2007 Mr. Cuccia responded in detail to

[3] *Margreate Lublin*, 44 ECAB 945 (1993). *See generally Thomas D. McEuen*, 42 ECAB 566 (1991).

[4] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[5] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[6] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Groom, M., concurring).

appellant's allegations. He stated, among other things, that the November 6, 2004 conversation in which he and Mr. Kleber allegedly told appellant that he was only fit to supervise custodians "did not occur" and was a complete false statement. Mr. Kleber also flatly denied appellant's allegation. He stated that he had no authority to demote appellant. Appellant did not discharge his burden of proof to submit convincing evidence to substantiate his version of events.

The problem with relying on a person's perception of mistreatment is well illustrated in this particular instance. Appellant submitted a November 9, 2004 e-mail from Mr. Cuccia. According to him, this e-mail "clearly states that I am only fit to supervise custodians":

> "I talked with Mr. Kleber concerning your present assignment and whether you will still need to provide the Postal Service with medical documentations concerning your "service" connected medical condition that prevents you from climbing ladders. The Postal Service is still requesting documentation to validate this medical condition which prevents you from performing your core requirements here…. Your present assignment to supervise custodians, at this time, is the only maintenance … function you appear to be able to perform in order to provide you with productive work which also meets your claim of service connected medical condition. Both reactive and corrective supervision requires that the supervisor inspects the performance of their employees' work which is primarily up in the steel which would involve climbing ladders. I will provide you with training that will help you to be able to instruct and supervise custodians in their performance of their assignments as well as assist you in the identification of all major types of equipment. If you have further question on this matter please feel free to discuss them with me. It is imperative that you provide us with your medical records ASAP [as soon as possible] so we can evaluate your medical condition and/or your medical restrictions."

Mr. Cuccia simply noted that appellant's current assignment was the only employment available that was both productive and suitable to his service-connected medical condition, since he could not inspect employees' workup in the steel. Appellant appears to have taken this as an insult, that he was "only fit to supervise custodians." However, a reasonable reading of this e-mail does not support his perception. The Board finds that the e-mail does not establish abuse or harassment by management.

Appellant alleged daily harassment and retaliation for his EEO activity and federal law suit. He has submitted no credible evidence proving that harassment or retaliation occurred as alleged. This is the reason appellant has not met his burden of proof. He has pursued his allegations by filing several EEO complaints, but he has yet to submit a final decision from the EEO Commission finding, as a matter of fact, that the employer harassed him, discriminated against him, retaliated against him or committed any other kind of wrongdoing. Medical evidence that appellant "is under extreme stress and duress at work" is no proof of administrative error or abuse. It is merely a repetition of his complaint to the physician. The Board has noted that, if a claimant cannot establish a factual basis for his allegations, the medical evidence is largely irrelevant.

Mr. Kleber confirmed that appellant requested a fitness-for-duty examination for his knees because he told other supervisors that he could not climb ladders. So the request is established by the evidence, but there is no evidence, apart from his opinion in the matter, that requesting a fitness-for-duty examination violated postal regulations or the Privacy Act, as alleged. Appellant reacted strongly to the request for a fitness-for-duty-examination and charged management with harassment. He submitted general information on fitness-for-duty-examinations, but it does not establish that management committed an administrative error in the matter.

Appellant submitted other evidence apart from his own statements. An October 11, 2005 final decision under the Debt Collection Act of 1982 found that, because the employer did not respond to appellant's petition, it could not collect money from appellant's salary on account of the debt alleged in the case. This decision does not find that the employer committed error; it simply stopped any future collection because the employer did not respond. Appellant submitted no proof that the employer violated this decision by collecting money from his salary after notice of the decision.

Appellant submitted general information on reporting procedures, but he submitted nothing to prove management violated its responsibilities. He submitted a January 23, 2007 letter from the plant manager concerning CA-2 claims. The plant manager investigated each of appellant's allegations and discussed his concerns on January 17, 2007, at which time appellant acknowledged that a CA-2 was completed for him on January 12, 2007. The plant manager stated that he reviewed procedures with his staff, but he did not find that any individual committed administrative error in the matter.

Appellant also submitted a February 27, 2006 notice of denial for a change in his performance rating. Although Mr. Kleber and Mr. Cuccia requested a higher rating for appellant, the area vice president denied the requested change. The Board finds that there is no evidence that this denial constituted administrative error or abuse.

Appellant rests his case primarily on his personal perception of events. He repeatedly responded to management responses as follows:

> "This is clear direct harassment and creating a hostile work environment I receive from James Kleber, Andy Cuccia and management on a daily basis. This was not an administrative error this was harassment and retaliation for EEO activity and my federal law suit. I was under doctor care for stressful and hostile working environment. Management my employer acted maliciously and abusively regarding this matter."

Appellant referred to "proof," such as Mr. Cuccia's November 9, 2004 e-mail on supervising custodians. The Board has reviewed the evidence of record and can find no proof of management error or abuse.

Appellant strongly feels that his employer has mistreated him, but the employer has responded to his allegations and has rebutted the charges. He has submitted insufficient evidence that the harassment and retaliation he alleged actually occurred. Appellant has not met

his burden to establish that his claim falls within the scope of workers' compensation. The Board will affirm the Office's June 13, 2007 decision denying his claim for benefits.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[7]

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[8] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[9] In such a case it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[10]

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing before an Office hearing representative was postmarked on July 30, 2007, more than 30 days after the Office's June 13, 2007 decision denying his claim for benefits. His request is therefore untimely. Appellant is not entitled to an oral hearing as a matter of right.

The Office nonetheless had discretion to grant appellant's request. It exercised its discretion and denied the request because he had an alternative appellate remedy: he could equally well address the issue in his case through the reconsideration process. As appellant may indeed address the deficiency in his claim by submitting to the Office, with a request for reconsideration, new and relevant factual evidence clearly proving that the employer committed error or abuse against him, the Board finds that the Office did not abuse its discretion in denying his untimely request for an oral hearing.[11] The Board will affirm the Office's August 28, 2007 decision.

[7] 5 U.S.C. § 8124(b)(1).

[8] 20 C.F.R. § 10.616(a) (1999).

[9] *Herbert C. Holley*, 33 ECAB 140 (1981).

[10] *Rudolph Bermann*, 26 ECAB 354 (1975).

[11] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained an emotional condition in the performance of duty. The factual evidence does not establish employer error or abuse in any administrative or personnel matter. The Board also finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative. The request was untimely and the Office properly exercised its discretion in denying the request.

ORDER

IT IS HEREBY ORDERED THAT the August 28 and June 13, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 18, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board